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IN THE

SUPREME COURT OF THE UNITED STATES.

No. 607.

MERREL P. CALLAWAY, as Trustee of the Central of Georgia Railway Company, Debtor, et al.,
Petitioners,

v.

L. O. BENTON, JR., et al.,
Respondents.

(Petition for Writ of Certiorari to United States Circuit Court of Appeals, Fifth Circuit.)

BRIEF OF RESPONDENTS IN OPPOSITION TO THE GRANTING OF THE WRIT.

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INDEX.

	Page
Preliminary statement	1
Statement of the case	7
Brief and argument	21
Cases cited in brief in support of the petition	50
Conclusion	59

Cases Cited.

Alexander v. A. & W. P. R. Co., 108 Ga. 151	56, 57
Bryan v. Speakman, 53 Fed. (2d) 465	46
Central New England Ry. Co. v. Boston and Albany R. Co., 279 U. S. 415	50
Continental Bank & Trust Company v. Rock Island, 294 U. S. 648	31, 32
Crown Cork and Seal Company v. Guttmann Company, 304 U. S. 159, 58 Sup. Ct. Rep. 842	3
Dady v. Georgia & Alabama R. Co., 112 Fed. 838	51, 52, 53
Dartmouth College case, 4 Wheat. 518, 4 L. Ed. 629	55
Dize v. Maddrix, 323 U. S. 702, 65 Sup. Ct. 135	6
Ecker v. Western Pacific R. Corp., 317 U. S. 448, 466-475, 63 S. Ct. 692, 704-708	39
Erie R. Co. v. Tompkins, 304 U. S. 64, 58 Sup. Ct. 817	56
Farmers Loan & Trust Company v. Lake Street Elevated R. Co., 177 U. S. 51	29, 49
Fidelity Union Trust Co. et al. v. Field, 311 U. S. 169, 61 Sup. Ct. 176	57
Freeman v. Howe, 24 Howard 450	25
Gardner v. New Jersey, 329 U. S. 565	31, 38, 40, 41
General Talking Pictures Corporation v. Western Electric Company et al., 304 U. S. 175, 58 S. Ct. 849	3
Hagan v. Lucas, 10 Peters 400	25
Helvering, Commissioner, v. Taylor, 293 U. S. 507, 55 Sup. Ct. Rep. 287	3

Huron Holding Corporation et al. v. Lincoln Mine Operating Company, 312 U. S. 183, 61 Sup. Ct. 513... 57
In re Central R. of New Jersey, 163 Fed. (2d) 44.... 42
Kline v. Burke Construction Co., 260 U. S. 226, 43 S. Ct. 79 26
Lion Bonding and Surety Company v. Karatz, 262 U. S. 77, 43 S. Ct. 480..... 29
Mandeville et al. v. Canterbury, 318 U. S. 47, 48-49, 63 Sup. Ct. Rep. 472, 473..... 42
Mason v. Paradise Irrigation District, 326 U. S. 704, 66 Sup. Ct. Rep. 54..... 6
Mayor etc. of Knoxville v. Knoxville & O. R. Co., 22 Fed. 758 (appeal dismissed 136 U. S. 642)..... 56
Meyer v. Fleming, 327 U. S., 66 Sup. Ct. 382..... 43
National Licorice Company v. National Labor Relations Board, 309 U. S. 350, 60 Sup. Ct. 569..... 3
Newberger, Petitioner, v. Commissioner of Internal Revenue, 310 U. S. 655, 60 S. Ct. 1085..... 6
Pflueger et al. v. Sherman et al., 293 U. S. 55, 58, 55 Sup. Ct. 10, 11 5
Rorick v. Devon Syndicate, Ltd., 307 U. S. 299, 59 S. Ct. 877 3
Ruhlin et al. v. New York Life Ins. Co., 304 U. S. 202, 58 Sup. Ct. 860..... 57
School District v. Insurance Co., 101 U. S. 472..... 59
Singleton v. South Western Railroad, 70 Ga. 464.... 56, 58
Smith v. Hoboken R. Co., 328 U. S. 123. .31, 33, 34, 35, 36, 39
Taylor v. Carryl, 20 Howard 583..... 25
Theis v. Spokane Falls Gas Light Co., 49 Wash. 477, 95 Pac. 1079, 1080..... 51
Thompson v. Texas Mexican Ry. Co., 328 U. S. 134. .31, 33
Toucey v. New York Life Insurance Company, 314 U. S. 118, 62 S. Ct. 139..... 21
United States ex rel. David Goodman, Petitioner, v. Hearn, 328 U. S. 833, 66 Sup. Ct. 1375..... 6
W. B. Worthen Co. v. Kavanaugh, 295 U. S. 56, 55 Sup. Ct. 55 56
Weil v. Neary, 278 U. S. 160, 49 Sup. Ct. Rep. 144.. 59
White v. Johnson et al., 282 U. S. 367, 51 Sup. Ct. 115.. 5

Textbooks Cited.

12 American Jurisprudence, page 14, Constitutional Law, Sec. 386 56
California Law Review, December 1947, Vol. 35, No. 4, pages 545, 546 et seq. 21

Statutes Cited.

Code of 1933, Secs. 94-328, 94-329 ..... 56, 58
Judicial Code, 28 U. S. C. A., Sec. 379 ..... 21, 44
Supreme Court Rules, effective Feb. 27, 1939, Rules 37 and 38 (2) 2, 4, 5

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PRELIMINARY STATEMENT.

February 13, 1939, the Supreme Court of the United States adopted new, revised rules, effective February 27, 1939, supplanting the revised rules adopted June 5, 1928, effective July 1, 1928, as amended (U. S. C. A., Title 28, following section 354, 1947 Cumulative Annual Pocket Part).

Rule 38 (2) of these new, revised rules provides:

> "The petition shall contain a summary and short statement of the matter involved; a statement particularly disclosing the basis upon which it is contended that this Court has jurisdiction to review the judgment or decree in question (See Rule 12, Par. 1); **the questions presented**; and the reasons relied on for the allowance of the writ. **Only the questions specifically brought forward by the petition for writ of certiorari will be considered.** A supporting brief may be annexed to the petition or presented separately, but it must be direct and concise (See rules 26 and 27). A failure to comply with these requirements will be a sufficient reason for denying the petition. . . ." (Emphasis ours.)

We respectfully suggest that the petition should be denied on account of the utter failure of the petitioners to comply with this rule in at least one respect. There is no statement of "the questions presented." There are, therefore, no "questions specifically brought forward" which can be considered by the Court.

In the division of the petition first numbered 14 (pages 7-13, there is another division numbered 14 on page 14), there are eighteen assignments or specifications of error addressed to the majority opinion and judgment of the Circuit Court of Appeals, which attempt to cover all of the issues which were tried in the District Court, and which seek to have the whole case tried de novo before the Supreme Court, but there is no statement of "the questions presented."

Assignments of error as to the opinion and judgment of the Circuit Court of Appeals are not the equivalent of a statement of the questions presented.

In National Licorice Company v. National Labor Relations Board, 309 U. S. 350 (60 Sup. Ct. 569), your Honors limited your review to the questions specifically raised in the petition for certiorari (309 U. S., at page 357, footnote 2). The Court cited in support of this holding General Talking Pictures Corporation v. Western Electric Company et al., 304 U. S. 175, 58 S. Ct. 849. In the latter case, under the caption "Questions Presented," the petitioner posed three specific questions. The Court said: "Our consideration of the case will be limited to the questions specifically brought forward by the petition" (304 U. S., at page 177).

In the case at bar, there are no "questions specifically brought forward by the petitioner." Suppose the Court granted the petition here. What questions would the Court consider?

In Crown Cork and Seal Company v. Guttmann Company (304 U. S. 159, 58 Sup. Ct. Rep. 842), decided the same day as the General Talking Picture Company case, the Court had held, after stating the specific questions presented by the writ (304 U. S., at pages 160-161): "Our consideration of the case will be limited to these questions."

In Rorick v. Devon Syndicate, Ltd., 307 U. S. 299, 59 S. Ct. 877, the Court said:

> "Of the various questions raised below and briefed here, **only those urged in the petition for certiorari and incidental to their determination will be considered on review**" (307 U. S., at page 303). (Emphasis ours.)

Even prior to the adoption of the new rule, the Court had stated in Helvering, Commissioner, v. Taylor, 293 U. S. 507, 55 Sup. Ct. Rep. 287: "The only question for

consideration is that stated in the petition for the writ of certiorari" (page 511). The question stated was specifically stated (293 U. S., at page 508).

We assume that it will be argued that the statement of these assignments or specifications of error constitute a sufficient statement of "the questions presented" and are "the questions specifically brought forward by the petition for the writ of certiorari."

The history of the rule indicates to us the contrary.

Rule 35, adopted originally in June, 1925 (28 U. S. C. A., following Section 354, at page 423), was a "certiorari rule." It read: "The petition shall contain only a summary and short statement of the matter involved and the reasons relied on for the allowance of the writ. A supporting brief may be included in the petition, but whether so included or presented separately, it must be direct, concise, and in conformity with rules 24 and 25."

That rule 35 was superseded by rule 38 of the Revised Rules of the Supreme Court, adopted June 5, 1928 (505 S. Ct. Rep., page XXXIX). That rule did not require a statement of "the questions presented", nor did it provide that "only the questions specifically brought forward by the petition for writ of certiorari" would be considered.

The present rule 38, adopted February 13, 1939, supplanted the rule 38 of June 5, 1928, and for the first time injects the requirement of a statement of the questions presented and the consequent provision as to what questions would be considered by the Court.

The Court, by inserting in 1939 the new language into the rule, must have had a purpose in mind, and it seems to us that that purpose was to require questions of law to be specifically, distinctly, and definitely stated in peti-

tions for the writ, in order that the Court might review important questions of law and not cases as a whole.

We have thought, and respectfully suggest, that under the Revised Rule 38, a petitioner for the writ of certiorari should present his questions, should "bring forward" specific questions of law with the same definiteness and clarity required by a Court of Appeals in certifying questions under rule 37.

Rule 37 (U. S. C. A., Title 28, following Section 354, 1947 Cumulative Annual Pocket Part, page 161) is:

> "Where a Circuit Court of Appeals or the United States Court of Appeals for the District of Columbia, shall certify to this Court a question or proposition of law, concerning which it desires instruction for the proper decision of a cause, the certificate shall contain a statement of the nature of the cause and of the facts on which such question or proposition of law arises. Questions of fact cannot be so certified. Only questions or propositions of law may be certified, and they must be distinct and definite."

Applying to this rule, the Court has repeatedly held that it will not answer questions of objectionable generality. White v. Johnson et al., 282 U. S. 367, 51 Sup. Ct. 115, and cases cited, 282 U. S., at page 371.

In applying rule 37, the Court has said:

> "The Court cannot be called upon to answer questions of objectionable generality, or to review proceedings, facts, and circumstances for the purpose of deciding a variety of preliminary questions in order to reach and decide 'an ultimate question submitted.'"

Pflueger et al. v. Sherman et al., 293 U. S. 55, 58, 55 Sup. Ct. 10, 11.

The vice in the petition here is demonstrated by an attempt to answer this question: If the Court should grant this petition, what questions would it consider?

We have many times noted that in granting petitions for certiorari, the Court limits the grant to a consideration of only certain questions of those presented. For example, in Newberger, Petitioner, v. Commissioner of Internal Revenue, 310 U. S. 655; 60 S. Ct. 1085, the Court granted a petition for writ of certiorari "limited to the second and third questions thereby presented." In Dize v. Maddrix, 323 U. S. 702, 65 Sup. Ct. 135, the petition was granted "limited to question 2 (d) presented by the petition for the writ . . ."

In Mason v. Paradise Irrigation District, 326 U. S. 704, 66 Sup. Ct. Rep. 54, the petition was granted "limited to the question whether any applicable rule requiring equality of treatment among creditors was violated by the difference between the treatment accorded the petitioner and that accorded the Reconstruction Finance Corporation under the approved plan."

In United States ex rel. David Goodman, Petitioner, v. Hearn, 328 U. S. 833, 66 Sup. Ct. 1375, the petition was granted "limited to the third and fourth questions in the petition for writ of certiorari."

These instances (which could be supplemented with many others, no doubt) indicate to us that under rule 38 as it has been revised, questions of law and not cases in their entirety are reviewed by the court on certiorari. Where no questions are stated in the petition, there is no petition.

STATEMENT OF THE CASE.

We are not content with the "summary and short statement" of the matter involved as it appears in the petition, in the light of the fact that there are no specific questions presented for the Court's consideration and for our response. Inasmuch as the whole case is placed before the Court, we prefer that it be presented as it was in the Circuit Court of Appeals.

Respondents (appellants there) stated the case in their brief as follows:

1.

March 25, 1947, L. O. Benton, Jr., and Charles J. Haden, as stockholders of South Western Rail Road Company (sometimes hereinafter called "South Western") brought a petition in equity in behalf of themselves and others similarly situated who cared to intervene against the South Western, its officers, and Directors in the Superior Court of Bibb County, Georgia (R., page 133).

The prayers of this petition were as follows:

> "That the defendant officers and Directors of The South Western Rail Road Company be restrained and enjoined from holding a stockholders' meeting on March 28, 1947, and from submitting to such meeting the proposed plan to sell the railroad properties of The South Western Rail Road Company.
>
> "If this Honorable Court should not restrain and enjoin the holding of the stockholders' meeting, as herein prayed, and if at that meeting a mere majority of the stockholders should vote in favor of the acceptance of the plan and the resulting sale of all the railroad properties of the defendant corporation, that the

officers and Directors of the defendant Company be restrained and enjoined from carrying such action of the stockholders into effect, and specifically that the officers and Directors be restrained and enjoined from filing with the District Court of the United States for the Southern District of Georgia, or with the Interstate Commerce Commission any acceptance of the plan, and that the officers and Directors of the defendant Company be specifically restrained and enjoined from selling to the re-organized company, or to any one else, or any other company, all the defendant Company's railroad properties, rights, and franchises, and be specifically restrained and enjoined from executing any written instrument which might convey the fee-simple title to the property just mentioned unto the re-organized company or any other company; and be specifically restrained and enjoined from doing and performing any act in behalf of The South Western Rail Road Company which might tend to consummate the plan of reorganization of Central of Georgia Railway Company with respect to the acquisition of the properties of The South Western Rail Road Company;

"For such other and further relief as to the Court may seem meet and proper."

(a) With respect to the South Western, this petition showed that South Western was a railroad corporation, having its principal office and place of business in Bibb County, Georgia, incorporated by an Act of the General Assembly of Georgia approved December 27, 1845, which Act and amendments thereto accepted by it constitute its charter. This original charter, as evidenced by the Act of 1845, was several times amended by the General Assembly of Georgia prior to the general Railroad Incorporation Act of 1892. Each of the amendments was accepted by the South Western.

No amendment to its charter made any provision as to the sale of its railroad properties, and its charter is silent with respect thereto.

Therefore, the right to sell the entire properties of the South Western is governed by the general law as it existed at the time of the grant of the charter and the amendments. Under that general law, a majority of the stockholders are not empowered to sell the properties of the Company.

The South Western is a prosperous, going corporation, able to achieve the objects of its corporation, and neither its officers nor a majority of its stockholders have a right to sell its corporate property, or so much thereof as may prevent the continuance of its business as a corporation, and the carrying out of the purposes of its formation.

The capital stock of the South Western is $5,191,100.00, all of which is represented by common stock. Its properties are free from mortgage or other liens. It owes no bonded indebtedness. Its current indebtedness, on December 31, 1946, was $212,610.33, most of which had been paid at the time of the filing of the suit, and its current liabilities were less than $100,000.00.

Of the 51,191 shares of the capital stock of the Company, 50,471 were outstanding, in the hands of the public. According to the report of the Board of Directors of the South Western submitted to the one hundredth annual convention of stockholders of the Company, held in Macon, Georgia, on March 13, 1947, its road and equipment property are worth $9,523,736.81, and therefore its common stock has a book value in excess of $180.00 per share based on fixed assets alone.

In 1942 the Interstate Commerce Commission valued the road and equipment property at $12,830,257.00. According

to this valuation, its common stock would have a value, based on fixed assets alone, of approximately $240.00 per share.

The South Western comprises some 340 miles of railroads, bridges; and depots, and appurtenances thereto, in the heart of the system of the Central of Georgia Railway. Emanating from Macon, the lines of the South Western form that part of the Central of Georgia System extending from Macon through Fort Valley to Columbus; from Macon through Fort Valley to Americus, Smithville, Albany, and Columbia, Alabama. There joins with the latter line at Smithville a branch which extends from Smithville to Eufaula, Alabama.

Without the South Western, the Central of Georgia could not operate trains from Florida through Macon to the north and west. Without the South Western; the Central could not operate trains from, the coal fields which it touches at Birmingham, Alabama, and vicinity, to Savannah and coast. Without the South Western the Central would have no line from Macon to Alabama.

On December 19, 1932, the South Western was being operated by the Central under a long term lease, which produced to the South Western a rental sufficient to pay stockholders an annual dividend of 5 per cent. This annual rental was $259,550.00 and taxes and organization expense. On that date, in an equity cause in the Southern District of Georgia against the Central, H. D. Pollard was appointed Receiver of the property and assets of the Central. He continued to operate the properties of the Central and continued to operate South Western under lease until June 19, 1940, at which time the Central filed its petition in the District Court of the United States for the Southern District of Georgia, stating that it was unable to meet its

debts as they matured, and that they desired to file a plan of reorganization under the provisions of Section 77 of the Federal Bankruptcy Act. Thereafter, in conformity with the Act, on August 9, 1940, H. D. Pollard and A. B. Lovett were appointed Trustees. Trustees have continued to operate the business of the Central, subject to the control of the District Court and subject to the jurisdiction of the Interstate Commerce Commission, except that by death of other Trustees, Merrel P. Callaway has since April 20, 1942, been the sole Trustee of the property of the Central of Georgia Railway Company. As such, he has continued to operate the lines of the South Western under lease, and on October 21, 1943, he adopted the South Western lease for the duration of the bankruptcy.

(b) With respect to the plan, the petition showed that on January 28, 1944, Mr. Callaway, as Trustee, filed his plan of reorganization with the District Court of the United States for the Southern District of Georgia, and contemporaneously filed it with the Interstate Commerce Commission. The plan was amended subsequently, but explicitly with respect to the South Western it provided:

> **"Prior to or upon consummation of the plan, the debtor shall also acquire, if they can be acquired on the terms hereinafter set forth, properties at present leased to the debtor by the South Western Rail Road. . . . If any of these properties shall not be acquired as a result of the acceptance of the plan by the leased line security holders, then and in that event the lease or leases of any line or lines not so acquired, shall be disaffirmed as of such time at or prior to the consummation of the plan as the Court may direct. The method of acquisition, whether through purchase, merger, or consolidation, shall, subject to the approval of the Commission and the Court, be determined by**

the Trustee or by the Reorganization Managers, when they begin to function. If the leased lines are acquired, the railroads of each of the three and the personal property appertaining thereto, and all the real estate owned by each lessor shall be conveyed to the reorganized Company; each of said lessors shall waive any damage to which it has become or shall become entitled on account of any breach of lease; and the South Western Rail Road Company shall waive all claims in respect to equipment. Such conveyances and waivers shall in each instance be the sole consideration of the delivery to each of the respective lessors of the securities proposed to be allocated to it, as hereinafter specified" (R., pages 138-9).

The debtor referred to hereinabove is the Central of Georgia Railway Company.

The securities proposed to be allocated to holders of South Western Rail Road Company capital stock referred to in the above-quoted portion of the plan, were provided for in the plan as follows:

> "Holders of South Western Railroad capital stock would receive for each $1,000.00 of stock, $423.00 in new first mortgage, Series A bonds, and $340.97 in new income mortgage, Series A bonds of the proposed reorganized Company" (R., pages 139-40).

The proposed new first mortgage bonds would be secured by the first lien, subject as to equipment to the liens of equipment obligations, on all railroads owned by the reorganized Company on consummation of the plan, including leaseholds and capital stocks of terminal companies. They would also be secured by a similar lien on the stock of the Ocean Steamship Company and certain other securities and property, and the mortgage securing

them would contain an appropriate after-acquired property clause.

New income mortgage bonds would be secured by a lien, subject to the lien of the first mortgage bonds, upon all property from time to time subject to the lien of that mortgage.

There would be presently issued under the plan, $14,000,000.00 of first mortgage bonds and $16,000,000.00 of income mortgage bonds. Of these first mortgage bonds there would be issued to the South Western stockholders approximately $2,100,000.00 thereof, and of the income bonds approximately $1,700,000.00 thereof, a total of approximately $3,700,000.00 of bonds for property worth in excess of $9,500,000.00 (R., pages 140-41).

(c) Charges of mismanagement were made against the officers and Directors—the basis of these charges being that on March 13, 1947, the Directors recommended the acceptance of the plan with respect to South Western after having continuously, over a period of three years, rejected it, and called a meeting of stockholders to be held fifteen days later to act upon their recommendation.

It was charged that the officers and Directors were proceeding with plans to accept the offer under the belief that a mere majority of the stockholders could authorize a sale of the properties of the South Western. Petitioner contended that those sections of the Georgia Code (94-328 and 94-329) (R., page 161), which authorize railroads under certain conditions to sell their property by vote of a mere majority of its stock, were inapplicable to the South Western Railroad Company. Those sections were derived from the Acts of 1933, page 235, and for reasons alleged in the petition were contended to be inapplicable to the South Western (R., pages 151-53).

2.

The Judge of the State Court issued a rule on this petition against South Western, its officers and Directors, calling upon them to show cause on March 26, 1947, why they should not be enjoined as prayed (R., page 161). The rule was argued March 26 and 27, 1947, and the Court reserved decision.

3.

On March 28, 1947, the stockholders of South Western held their meeting, and a majority of the capital stock was voted in favor of the acceptance of the plan (R., pages 105-111). The vote was 30,137 for and 9,057 shares against the sale (R., page 108).

Immediately, on the same day, the officers of South Western sent its ballot to Interstate Commerce Commission, signifying South Western's acceptance of the plan.

4.

April 18, 1947, Merrel P. Callaway, as Trustee of the property of the Central, filed a summary petition (R., pages 1-8), in the United States District Court for the Southern District of Georgia, in the matter of Central of Georgia Railway Company, Debtor, a proceeding for the reorganization of a railroad, against L. O. Benton, Jr., and Charles J. Haden, to enjoin them from prosecuting their suit in the State Court. The South Western was made a party defendant in this petition. On this petition the Judge of the District Court issued a temporary restraining order (pages 10-11 of R.) against L. O. Benton, Jr., and Charles J. Haden, restraining them from prosecuting their suit in the Superior Court of Bibb County, Georgia, or elsewhere than in the District Court, and also restraining all

other stockholders from prosecuting similar suits elsewhere than in that proceeding; and at the same time the District Court issued a rule to show cause why a permanent injunction should not issue, which rule was returnable May 26, 1947.

5.

On April 24, 1947, the Judge of the Superior Court of Bibb County, Georgia, of his own motion, issued an interlocutory injunction against the defendants in the State Court suit (R., pages 246-249). He overruled the charges of mismanagement made against the defendant, and put his grant of injunction on the ground that South Western had no charter power to sell its railroad without the unanimous consent of its stockholders. The contention of the petitioners in the State Court had been that such a sale could not be had upon the vote of a mere majority of the stockholders (R., pages 155, 157).

The injunctive part of the State Court's order was:

> "It is therefore ordered that the defendants, the officers and directors of the defendant railroad company, be and each and all of said defendants are hereby restrained and enjoined from carrying into effect any provision for the sale or lease of the railroad properties of the defendant railroad company pursuant to any acceptance or purported acceptance of any plan for any such sale or lease not authorized by a unanimous vote of the stockholders of the defendant company; and specifically that such officers and directors be and they are hereby restrained and enjoined from filing with the District Court of the United States for the Southern District of Georgia, or with the Interstate Commerce Commission any acceptance of such plan; and specifically that such officers and directors

be and they are hereby restrained and enjoined from selling to such reorganized company as may succeed the Central of Georgia Railway Company and its Receiver, or to anyone else, or to any other company, all of the defendant railroad company's railroad properties, rights and franchises; and specifically that such officers and directors be and they are hereby restrained and enjoined from executing any written instrument which might convey the fee simple title to the property just mentioned unto the reorganized company or any other person or company; and specifically that such officers and directors be and they are hereby restrained and enjoined from doing and performing any act in behalf of the defendant railroad company which might tend to consummate the plan of reorganization of the Central of Georgia Railway Company with respect to the acquisition by that Company of the properties of the South Western Railroad Company" (R., page 249).

6.

Merrel P. Callaway, as Trustee, thereupon amended his petition in the District Court by bringing to the attention of that Court the injunctive order of the Superior Court of Bibb County, and by striking Charles J. Haden as one of the respondents, his name having been stricken as a plaintiff in the State Court at his instance (R., pages 32-34).

In this amended petition Callaway, as Trustee, prayed that the District Court adjudicate the question whether, under the laws of Georgia and the circumstances of this case, the unanimous consent of the stockholders of South Western was a condition precedent to the acceptance of the said plan by the South Western and the consummation of the plan by the conveyance of its property to the reorganized Company; and further prayed that the injunc-

tive order of the Superior Court of Bibb County be annulled and declared void, and that when the plan should be confirmed by the District Court that such order might be passed as would make effective the acceptance and consummation of the plan by the South Western.

7.

The case in the District Court was heard on May 26, 1947. Evidence was introduced at the hearing and the case was argued orally and by briefs.

8.

Dr. W. G. Lee, I. L. Domingos, Gordon S. Chapman, J. P. Illges, Jr., and Charles Loridans, all stockholders of South Western, individually and as members of the Executive Committee of the Stockholders Protective Committee of the South Western Rail Road Company, intervened in the District Court in support of the position of L. O. Benton, Jr. The intervention showed that the Stockholders Protective Committee represented shareholders of the South Western owning more than five thousand shares of its stock (R., pages 44-47).

In our brief in the Circuit Court of Appeals we stated as the first of the main questions before that Court:

> "Under the facts and the law applicable thereto, did the Bankruptcy Court have exclusive jurisdiction to determine whether the properties of South Western could be acquired by the Central on the terms set forth in the plan by the mere majority vote of the stockholders of South Western?"

We filed a supplemental brief which we hoped would be helpful to the Circuit Court of Appeals in its consideration of the factual element involved in the stated question.

That brief contained a chronological table of events, as follows:

January 28, 1944. Trustees filed plan of reorganization with District Court and Interstate Commerce Commission (R. 138).

March 9, 1944. Stockholders of South Western passed, by unanimous vote of those present (save for 100 shares dissenting), resolution: ". . . that the terms of the purchase proposed by the Trustee are hereby declared to be grossly unfair and inadequate to South Western Rail Road and are hereby unhesitatingly rejected" (R. 141).

March 8, 1945. By the same vote, at the 1945 annual meeting of stockholders, the 1944 resolution was reaffirmed (R. 141).

March 14, 1946. Directors of South Western submitted report to annual meeting of stockholders, stating: "The stockholders of this Company in meeting assembled, and upon two occasions, have rejected the price offered for their property in the plan of reorganization. The offer for that property, in the opinion of your Directors, is entirely inadequate, unfair and unjust to the stockholders of this Company. The conclusions reached in the plan are based on misleading and unreliable figures, and seem to totally ignore the fact that the property of this Company is necessary and indispensable to the successful operation of the Central System as a whole" (R. 143).

March 14, 1946. Stockholders unanimously reaffirmed 1944 resolution, rejecting the Trustee's offer (R. 143).

June 24, 1946. Opinion of the District Judge, approving plan of reorganization, in which he stated: "If the lessors do not accept the proposition to acquire their

lines, they are, on disaffirmance, at liberty to take their properties back" (R. 112).

January 25, 1945. At Directors' meeting of South Western, primary purpose of which was to decide what, if any, recommendation Board would make to stockholders, it was decided that board would take no action on question "at this meeting" (R. 145).

March 13, 1947. Annual meeting of stockholders of South Western held. No recommendation made by Board to stockholders. No action taken by stockholders with respect to offer (R. 147).

(It was at this meeting that President, and old Board of Directors were re-elected.)

Later in day on March 13, 1947. Upon adjournment of stockholders' meeting, Board of Directors, two absent, accepted provisions of plan regarding South Western, subject to acceptance by stockholders at meeting to be held March 28, 1947 (R. 147).

March 19, 1947. L. O. Benton, Jr., a stockholder of South Western, requested postponement of meeting of March 28 for sixty days, and requested that before any proposition of sale was submitted to stockholders, that Directors have another meeting at which he and others might present their views. These requests were refused (R. 150).

March 25, 1947. Suit in State Court Filed by Benton (R. 133, 161).

March 26-27, 1947. Hearing in State Court on prayers for injunction (R. 161, 165-230). No decision then made by State Court Judge.

March 28, 1947. Adjourned annual meeting of stockholders of South Western held, and offer for properties

accepted by vote of 30,137 shares to 9,057 shares (R. 65). (Approximately 12,000 shares not voting.)

April 18, 1947. Callaway, as Trustee, files suit in Federal Court to enjoin Benton and other stockholders of South Western from prosecuting State Court suit. Temporary restraining order granted (R. 1, 11).

April 24, 1947. State Court Judge issued interlocutory injunction, enjoining officers and Directors of South Western from selling properties, etc. (R. 27, 30-1).

May 26, 1947. Callaway, as Trustee, amended his Federal Court action, praying for adjudication by Federal Court of matters involved in State Court suit, to which he was not a party, and praying annulment by Federal Court of State Court's interlocutory injunction (R. 32).

August 15, 1947. Federal Court Judge granted permanent injunction, enjoining Benton and others from prosecuting State Court suit, and annulling and declaring void the State Court's injunction (R. 93).

The Circuit Court of Appeals reversed the District Court (two Judges concurring, one dissenting). The opinion is, of course, in the record here.

BRIEF AND ARGUMENT.

We urged the application, by the Courts below to the facts of the case at bar, of Section 265 of the Judicial Code, which is:

> "The writ of injunction shall not be granted by any Court of the United States, to stay proceedings in any Court of a state **except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy**" (28 U. S. C. A., Section 379). (Emphasis ours.)

We realized that in addition to the statutory exception emphasized in the section just quoted, there were exceptions which the Courts had engrafted upon the section. Among these exceptions is (as expressed in a recent Law Review article) "the res exception which allowed injunctions against State Court proceedings which sought to deal with a res under the jurisdiction of the Federal Court" (California Law Review, December, 1947, Vol. 35, No. 4, pages 545, 546 et seq.).

This exception was treated by the Court in Toucey v. New York Life Insurance Company, 314 U. S. 118, 62 S. Ct. 139, as follows:

> "This brings us to applications of Section 265 apart from these statutory qualifications. The early decisions of this Court applied the Act of 1793 as a matter of course. However, a line of cases beginning with Hagan v. Lucas, 10 Pet. 400, 9 L. Ed. 470, holds that the Court, whether federal or state, which first takes possession of a res withdraws the property from the reach of the other. Taylor v. Carryl, 20 How. 583, 597, 15 L. Ed. 1028; Freeman v. Howe, 24 How. 450, 16 L. Ed. 749. See Kline v. Burke Con-

struction Co., 260 U. S. 226, 235, 43 S. Ct. 79, 83, 67 L. Ed. 226, 24 A. L. R. 1077: 'The rank and authority of the (federal and state) courts are equal; but both courts cannot possess or control the same thing at the same time, and any attempt to do so would result in unseemly conflict. The rule, therefore, that the court first acquiring jurisdiction shall proceed without interference from a court of other jurisdiction is a rule of right and of law based upon necessity, **and where the necessity, actual or potential, does not exist, the rule does not apply.** Since that necessity does not exist in actions in rem and does not exist in actions in personam, involving a question of personal liability only, the rule applies in the former but does not apply in the latter.' The Act of 1793 expresses the desire of Congress to avoid friction between the federal government and the states resulting from the intrusion of federal authority into the orderly functioning of a state's judicial process. The reciprocal doctrine of the res cases is but an application of the reason underlying the Act. Contest between the representatives of two distinct judicial systems **over the same physical property** would give rise to actual physical friction. The rule has become well settled, therefore, that Section 265 does not preclude the use of the injunction by a federal court to restrain state proceedings seeking to interfere with **property** in the custody of the court. Farmers Loan & Trust Co. v. Lake Street Elevated R. Co., 177 U. S. 51, 60, 20 S. Ct. 564, 568, 44 L. Ed. 667; Kline v. Burke Construction Co., 260 U. S. 226, 229, 235, 43 S. Ct. 79, 81, 83, 67 L. Ed. 226, 24 A. L. R. 1077; Lion Bonding & Surety Co. v. Karatz, 262 U. S. 77, 88, 89, 43 S. Ct. 480, 484, 67 L. Ed. 871; see Warren, Federal and State Court Interference, 43 Harv. L. Rev. 345, 359-66. And where a state court first acquires control of the res,

the federal courts are disabled from exercising any power over it, by injunction or otherwise. Palmer v. Texas, 212 U. S. 118, 29 S. Ct. 230, 53 L. Ed. 435."

Toucey v. New York Life Insurance Co., 314 U. S., at pages 134-136 (62 S. Ct., at pages 144-145).

What the Circuit Court of Appeals did in the majority opinion was to answer the question hereinabove stated in the negative. In so doing, it necessarily held that neither the statutory exception nor the res exception applied to the facts of the case. We submit that it was correct in so holding. In determining the correctness of the ruling, it is first necessary to determine what is the res with which we are concerned. The res is the properties at present leased to the Central of Georgia Railway Company by the South Western Rail Road—the fee simple title to these properties. The Interstate Commerce Commission in the plan authorized the debtor (Central of Georgia) to acquire those properties if they could be acquired on the terms set forth in the plan. Thus, the Circuit Court of Appeals described the res involved:

"Because the debtor's trustee has actual possession under its lease of certain tangible property of the South Western Railroad Company, the trustee claims to be in possession of all the property in controversy. We do not concur in this contention. The debtor is seeking (not to enforce a lien upon tangible property as in Warren v. Palmer, 310 U. S. 132, but) to acquire the incorporeal reversionary interest of its lessor, which arose by operation of law when the leasehold was carved out of the fee-simple title. This is a vested future interest to commence in possession after the determination of the lease. The lessee is not disputing the lessor's title, but is seeking to acquire it, and is claiming that the bankruptcy court

is administering this intangible asset. The fallacy in the argument is this: In the case of a tangible res, there can be possession in fact as well as in contemplation of law; but in the case of something intangible, possession is purely a legal concept that manifests itself only through recognition of legal consequences. So far as pertinent here, the legal consequences of a debtor's possession of a tangible asset at the time of his bankruptcy are that his trustee in bankruptcy succeeds to the debtor's possession; and that the bankruptcy court, acquiring possession thereby, has summary jurisdiction in rem to adjudicate adverse claims respecting the asset. Therefore, for practical reasons, the law attaches to the ownership of intangible property the legal consequences of possession of a tangible res. Thus in this case the law limits the possession of the lessee to the duration of the lease, while it attaches to ownership of the reversion in fee the legal consequences of possession. Such reversion, not being owned by Central at the time its petition for reorganization was filed, is in legal contemplation not now in possession of the bankruptcy court; and, since the law attributes to its mere ownership the legal consequences of possession, the bankruptcy court has no jurisdiction in rem of said reversionary interest." (Printed Opinion, pages 9-10.)

The utter difference between the majority and minority opinions below is this: The majority opinion treated the res as the "incorporeal reversionary interest of the (its) lessor, which arose by operation of law when the leasehold was carved out of the fee simple title"—(Opinion, page 9)—the lessor's title which added to the leasehold estate constituted the entire fee simple title. That is the res which the Commission had authorized the Debtor in

the plan to acquire if it could; that is the res for which the Debtor was authorized to make to the South Western an offer. The minority opinion treated the res as "the reorganization proceeding, including its controversies and questions and the plan it was instituted to bring about" (Opinion, page 20).

We most respectfully submit that the history of the res exception demonstrates the correctness of the opinion of the majority below. When the Courts, in engrafting the res exception upon Section 265, spoke of "a res" in the possession of a Court, they meant "a thing; physical property," and **not** a judicial proceeding.

In the Toucey case, supra, at page 135, the Court recognizes a res as physical property by saying: "Contest between the representatives of two distinct judicial systems over the **same physical property** would give rise to actual physical friction." (Emphasis ours.) And immediately following the language just quoted is: "The rule has become well settled, therefore, that Section 265 does not preclude the use of the injunction by a federal Court to restrain State proceedings seeking to interfere **with property** in the custody of the Court." (Emphasis ours.)

The first of the line of cases cited by the Court in the Toucey case as holding "that the Court, whether Federal or State, which first takes possession of a res withdraws **the property** from the reach of the other" (emphasis ours), is Hagan v. Lucas, 10 Peters 400. There the res was certain slaves. The next is Taylor v. Carryl, 20 Howard 583, where the res was a vessel. Taylor v. Carryl was followed by and in Freeman v. Howe, 24 Howard 450. There the res was certain railroad cars. The Court said:

> "In the case of Taylor et al. v. Carryl (20 Howard 583) the majority of the Court were of the opinion that, according to the course of decision in the case

of conflicting authorities under a State and Federal process, and in order to avoid unseemly collision between them, the question as to which authority should for the time prevail did not depend upon the rights of the respective parties to the property seized, when the one was paramount to the other, **but upon the question, which jurisdiction had first attached by the seizure and custody of the** PROPERTY **under its process.** This principle is equally applicable to the case of **property** attached under mesne process, for the purpose of awaiting the final judgment, as in the case of **property** seized in admiralty, and the proceedings *in rem.*" (At page 451. Emphasis ours, except as to the phrase *in rem.*)

In Kline v. Burke Construction Co., 260 U. S. 226, 43 S. Ct. 79, the Court refused to apply the res exception. Of that case, we said in our brief in the Circuit Court of Appeals:

"The Burke Construction Company brought an action at law against Kline and others in the United States District Court for the Western District of Arkansas. The jurisdiction of that Court was invoked, upon the ground of diversity of citizenship. The action was for a breach of contract, whereby the Construction Company had engaged to pave certain streets in Texarkana, and a trial was had which resulted in a mistrial.

"Subsequently to the commencement of the foregoing action, Kline and others instituted a suit in equity against Burke Construction Company in a State Chancery Court of the State of Arkansas, upon the same contract, joining as defendants the sureties on the bond which Burke Construction Company had given for faithful performance of the contract. The bill in the latter suit alleged that the Construction

Company had abandoned its contract and judgment was sought against the sureties as well as against the Burke Company. In the action brought by the Burke Company, Kline and others filed an answer and cross complaint. In the equity suit, Burke filed an answer and cross complaint. Thus the two cases presented substantially the same issues, the only difference being that resulting from the addition of the sureties as parties defendant in the equity suit. Both actions were in personam. The equity suit was removed to the United States Court upon the petition of the Burke Company on the ground of diversity of citizenship and upon the further ground that the question involved was a Federal question. Kline and others moved to remand. The District Court sustained the motion, and the equity suit was thereupon remanded to the State Court.

"After a mistrial of the action at law in the United States Court, the Burke Company filed a bill of complaint as a dependent bill to its action at law, by which it sought to enjoin Kline and others from further prosecuting the suit in equity in the State Chancery Court.

"The United States District Court denied the injunction and an appeal was taken to the Circuit Court of Appeals for the Eighth Circuit. That Court reversed the decision of the District Court and remanded the case with instructions to issue an injunction against the prosecution of the suit in equity in the State Court. From that decree, the case came to the Supreme Court upon writ of certiorari. The Supreme Court reversed the decree of the Circuit Court of Appeals.

"In other words, the Supreme Court held that the District Court was right in having denied the injunc-

tion. The Supreme Court decided that the District Court was right in refusing to enjoin Kline and others from further prosecuting their suit in the State Court. The reasons which prompted the Supreme Court so to hold are important here. Those reasons are shown at page 235 of the official opinion, page 83 of 43 Supreme Court Reporter, as follows:

"'The well established rule, to which we have referred, that where the action is one in rem, that Court —whether State or Federal—which first acquired the jurisdiction, draws to itself the exclusive authority to control and dispose of the res, involves the conclusion that the rights of the litigants to invoke the jurisdiction of the respective Courts are of equal rank . . . The rank and authority of the Courts are equal, but both Courts cannot possess or control the same thing at the same time, and any attempt to do so would result in unseemly conflict. The rule, therefore, that the Court first acquiring jurisdiction, shall proceed without interference from a Court of the other jurisdiction is a rule of right and of law based upon necessity, and where the necessity, actual or potential, does not exist, the rule does not apply. Since that necessity does exist in actions in rem, and does not in actions in personam, involving question of personal liability only, the rule applies in the former, but does not apply in the latter.'

"Let us apply that language to the facts of the case at bar.

"There is no res in the possession of either Court (except as the lease may give possession). The action in the State Court was not an action in rem. It was purely an action in personam. While the petition in the State Court action did not seek any money judgment in personam, against the officers and Direc-

tors of the South Western, it did seek a decree which would control their personal and official actions. The res—the physical properties of the South Western Rail Road—were not and are not in the possession or control of either Court, State or Federal.

"The question which remained to be adjudicated after the stockholders' meeting of March 28 had been held, was simply this: Have the officers and Directors of the South Western Rail Road the right to sell its properties upon a mere majority vote of its stockholders? The action was one in personam, and not one in rem, and no necessity, actual or potential, exists which requires the application of an injunction by a Federal Court to protect any res in its possession or control. Neither the South Western Rail Road Company, nor its officers, nor its Directors, nor its stockholders, are in the possession or control of the District Court of the United States for the Southern District of Georgia."

In Farmers Loan & Trust Company v. Lake Street Elevated R. Co., 177 U. S. 51, the res was the property of The Lake Street Elevated Railroad Company. There were two conflicting mortgage foreclosures as to this physical property.

In Lion Bonding and Surety Company v. Karatz, 262 U. S. 77, 43 S. Ct. 480, the res was the property of Lion Bonding and Surety Company. In the opinion in the Toucey case, supra, the Court referred to pages 88 and 89 of this opinion. The language there is:

"Where a Court of competent jurisdiction has, by appropriate proceedings, **taken property into its possesion** through its officers, the property is thereby withdrawn from the jurisdiction of all other Courts. Wabash Railroad v. Adelbert College, 208 U. S. 38, 54, 28 Sup. Ct. 182 . . . Compare Oklahoma v. Texas,

> 258 U. S. 574, 581 . . . Possession of the res disables other Courts of coordinate jurisdiction from exercising any power over it. Farmers Loan & Trust Company v. Lake Stret Elevated R. R. Co., 177 U. S. 51, 61 . . . The Court which first acquired jurisdiction through **possession of the property** is vested, where it holds possession, with the power to heat and determine all controversies relating thereto. It has the right, while continuing to exercise its prior jurisdiction, to determine for itself how far it will permit any other Court to interfere with such possession and jurisdiction. Palmer v. Texas, 212 U. S. 118, 126 . . ." (Emphasis ours.)

So in all cases cited by the Court in the opinion in the Toucey case in support of "the res exception" there was tangible physical property in the prior possession of the Court held to have prior jurisdiction.

At page 22 of the opinion in the case at bar, the dissenting Judge stated:

> "He (the District Judge) said, with complete clarity too, that under the controlling decisions of the Supreme Court of the United States, the res of which the Reorganization Court has exclusive jurisdiction is not merely, or even mainly, the physical properties of the debtor railroad. It is the **proceeding for its reorganization**, including all claims, issues and controversies affecting or relating to **the plan of reorganization, the prime res in the proceeding**, its formulation, acceptance and carrying out."

The Court, in its majority opinion, did not, as we read its opinion, hold that the res was "the physical properties of the debtor railroad." The physical properties which the plan authorized the debtor railroad to acquire, if it could, were those of the South Western Rail Road. As

we read the majority opinion, it decided the res to be "the incorporeal reversionary interest of the (its) lessor, which arose by operation of law when the leasehold was carved out of the fee-simple title" (Opinion, page 9). It decided the res to be the reversionary interest necessary to be acquired by the debtor in order for the debtor to acquire legally the full fee-simple title to properties leased to the debtor by the South Western Rail Road. This reversionary interest was not in the possession of the Bankruptcy Court. The fee-simple title to the properties of the South Western was not in the possession of the Bankruptcy Court. The physical properties of the South Western were not in the possession of the Bankruptcy Court except in so far as the lease gave it possession. The Bankruptcy Court had possession of a leasehold interest in the properties, **not** the properties; **not** the fee-simple title to the properties; **not** the reversionary interest in the properties which, plus the leasehold, makes up the fee-simple title. We respectfully submit that the dissenting opinion totally overlooks the fact that "the res exception" is based on the prior possession by the Federal Court of physical property.

In footnote 5 of the dissenting opinion, there are cited as the "controlling decisions" of the Supreme Court of the United States referred to in the first clause of the quotation last made from the dissenting opinion, the following:

Continental Bank & Trust Company v. Rock Island, 294 U. S. 648;
Thompson v. Texas Mexican Ry. Co., 328 U. S. 134;
Smith v. Hoboken Ry. Co., 328 U. S. 123; and
Gardner v. New Jersey, 329 U. S. 565.

With respect to Continental Illinois National Bank and Trust Company v. Chicago, Rock Island & Pacific Railway Company, 294 U. S. 648, we said in our brief below:

A mere reading of the facts of this case shows the difference between it and the case at bar. **There,** the debtor had outstanding collateral notes secured by mortgage bonds, a part of which were issued by it, part by a corporation forming a part of the system. The holders of the collateral notes were about to sell them. Those having interests adverse to the holders of these collateral notes set forth facts showing that unless the sale of the collateral was enjoined, it would be impossible to prepare and secure approval of a plan of reorganization. No plan of reorganization had been prepared. The bonds, which were about to be sold were the property of the debtor, and therefore a part of the res in the hands of the Bankruptcy Court. An injunction, enjoining the sale, was granted by the Bankruptcy Court. The grant of the injunction was affirmed because "The power to issue an injunction when necessary to prevent the defeat or impairment of its jurisdiction is, therefore, inherent in a Court of Bankruptcy as it is in a duly established Court of Equity" (294 U. S., at page 675).

The Court stated, at page 676, "An injunction may be issued in such circumstances for the purpose of protecting and preserving the jurisdiction of the Court until the object of the suit is accomplished and complete justice done between the parties."

The gist of the decision is shown at page 678, in the following language:

> "It is evident that the effect here wrought by the menace of impending sales of the collateral would seriously embarrass and probably prevent the formulation and consummation of a plan of reorganization."

That "gist" shows the utter difference between that case and the case at bar. There, no plan of reorganization

had ever been formulated. The properties about to be sold by the collateral note holders was property in the hands of the Trustee, and therefore in the hands of the Court. The use of that property was necessary in the formulation and consummation of the plan of reorganization.

> "The sale of the collateral securities from time to time during the progress of this consideration and work well might require such changes of detail in the plan, entailing new and perhaps difficult reconcilements of views among many and conflicting interests, as to force an abandonment of the proceeding."

How different is our case. The plan had been formulated, approved by the Commission and by the District Court. The plan recognized that the debtor might not acquire the South Western. The plan says to the debtor "Acquire it if you can on terms most advantageous to you, but the method of acquisition is left to the Trustee." The question of how it can be acquired in no way defeats or impairs the jurisdiction of the Bankruptcy Court.

With respect to Thompson v. Texas Mexican Ry. Co., 328 U. S. 134, we said:

There, "Tex-Mex" sued Thompson, Trustee for "Brownsville Railroad" (St. Louis, Brownsville and Mexico Railway Company) in a Texas State Court to enjoin Brownsville and its Trustee from using certain trackage which it had been using under contract, and to recover damages for the use. The State Courts held that the trackage contract had been terminated, and awarded Tex-Mex large damages. The Supreme Court granted certiorari and reversed.

In reviewing the Supreme Court, at page 142 of the official report, alluded to Smith v. Hoboken, decided the same day, said:

"We think that the same considerations are applicable to a determination that the trackage agreement in this case should be terminated pending formulation of a reorganization plan. By Section 77, sub. b, 'the plan of reorganization may adopt or reject executory contracts of the debtor as well as unexpired leases. And the adoption of either an executory contract or of a lease by the Trustee does not preclude a rejection of it in the plan. Moreover, trackage agreements like leases of railroad tracks and facilities are means by which railroad systems have been assembled. The retention or the sloughing off of trackage agreements may assume importance in the fashioning of a plan of reorganization by the Commission. The problem is kin to that involved in Continental Illinois National Bank and Trust Company v. Chicago, Rock Island and P. Ry. Co., 294 U. S. 648, 55 S. Ct. 595, 79 L. Ed. 1110. In that case the Court sustained the power of the reorganization Court to enjoin under Section 77 creditors, who held collateral notes of the debtor railroad secured by its bonds and bonds of its subsidiaries, from selling the collateral under a power of sale in the notes, where the sale would so hinder, obstruct, or delay the plan of reorganization as would likely defeat it. The Court stated, 294 U. S. at pages 676, 679, 55 S. Ct., at page 606, that a proceeding under Section 77 is a 'special proceeding which seeks only to bring about a reorganization, if a satisfactory plan to that end can be devised. And to prevent the attainment of that object is to defeat the very end the accomplishment of which was the sole aim of the section, and thereby to render its provisions futile.' The Court concluded, in view of the complexity of the problems involved in the reorganization, 'that without the maintenance of the status quo for a reasonable length of time no satisfactory plan could be worked out.'"

And further, on pages 142 and 144:

"We think like reasons make it important that the status quo of this trackage agreement be maintained pending decision by the Commission as to the proper treatment of it in the reorganization plan. The Commission may decide that it should be adopted. Or the Commission may conclude that the trackage agreement should be rejected or that its termination pursuant to its terms should be allowed. These matters involve not only the interest of the two parties to the trackage agreement but phases of the public interest as well.

"A Court which enforced the termination clause of the agreement pursuant to its terms would be narrowing the choice of the Commission and perhaps embarrassing it in the performance of the functions with which it has been entrusted. For these and like reasons which we have discussed in Smith v. Hoboken Railroad, W. & S. C. Co., supra, we think the Court erred in holding that the trackage agreement has been or should be terminated."

And the Court concluded, page 151:

"Thus, however the case may be viewed, the Court below should have stayed its hand and remitted the parties to the Commission for a determination of the administrative phases of the questions involved. Until that determination is had, it cannot be known with certainty what issues for judicial decision will emerge. Until that time, judicial action is premature. The judgment will be reversed and the cause remanded so that the case may be held pending the conclusion of appropriate administrative proceedings."

The "appropriate administrative proceedings" in our case are concluded.

The Commission and the District Court had remitted to any competent Court for a decision the question whether the properties of South Western might be legally acquired, and, if so, by the exercise of what quantity or quality of corporate authority.

Is there any better forum for the determination of these questions of Georgia law than the Georgia State Courts?

And regarding Smith v. Hoboken Ry. Co., 328 U. S. 123, we said:

Hoboken Manufacturers' Railroad Company (the debtor) operated a terminal switching railroad at Hoboken, New Jersey. The major part of its right of way and line of railroad was leased by it from Hoboken R. R. Warehouse and S. S. Connecting Company. The debtor (lessee) was in reorganization. Smith was its Trustee. The lessor moved the reorganization Court to terminate the lease. The Court granted the order, holding that the appointment of the Trustee was a breach of the terms of the lease, entitling the lessor to re-enter. The Circuit Court of Appeals affirmed (150 Federal [2d] 921). The Supreme Court reversed. The basis of the reversal is shown in division four of the opinion (page 951 of 66 Supreme Court):

> "But the question remains whether enforcement of the forfeiture clause would be consistent with the provisions of Section 77 (of the Bankruptcy Act) within the meaning of Section 77, sub. L. That question does not seem to have been considered by the lower Courts. Our view is that it presents problems primarily for consideration and decision by the Interstate Commerce Commission and that the reorganization Court should not have declared a forfeiture of the lease **until the questions had been passed upon by the Commission.**" (Emphasis ours.)

The Commission there had not yet approved or formulated a plan of reorganization. The Court called attention to that fact, and, after reviewing the necessity of the status quo being maintained until the Commission could formulate or approve a plan of reorganization, said:

> "The point is, that if the reorganization Court decreed a forfeiture **in advance of consideration of the problem by the Commission** it interferes with the functions entrusted to the Commission under Section 77. * * * If forfeiture of leases can be decreed **without prior reference of the matter to the Commission, it may be seriously embarrassed in preparing the plan which it deems necessary or desirable for the reorganization of the debtor.** * * * We hold that the District Court erred in declaring the lease forfeited and that the judgment should be reversed and the cause remanded. The District Court should stay its hand **pending a decision by the Interstate Commerce Commission on the question.**" (Page 953 of 66 Supreme Court.) (Emphasis ours.)

The emphasized portion of the foregoing quotation demonstrates the utter inapplicability of that case to our case.

In that case the reorganization Court declared a lease forfeited before the Commission could pass upon the import of the lease in the formulation of a plan of reorganization. The Supreme Court simply instructed the Reorganization Court to "stay its hand" until the Commission could pass upon the question at issue in connection with a plan.

In our case the Commission has acted. The Commission has said to the Trustee: Acquire the South Western's properties if you can. If you cannot, its lease stands disaffirmed.

In our case the Commission has considered the problem. It has approved a plan. There remains no question for consideration by the Commission.

The dissenting opinion deals with Gardner v. New Jersey, 329 U. S. 565, again at page 23, and quotes from it as follows:

> "The reorganization Court has jurisdiction over **all property of the debtor**, including that on which the State asserts a lien, and can adjudicate all questions and issues raised by objections to the State's claim, including the validity and priority of liens, whether or not claimed by the State." (Emphasis ours.)

We emphasized the words "all property of the debtor" in the foregoing quotation for, we think, it illustrates what is, with all respect, one of the fallacies in the dissenting opinion. The subject matter of our suit in the State Court was not "property of the debtor". It was property of a solvent corporation, not in bankruptcy, for which the debtor corporation had been authorized to make an offer. The question in our case in the State Court was: By what quantity or quality of corporate authority might that offer by the debtor be legally accepted? Neither were we, in our case in the State Court, seeking to have adjudicated any question as to the validity and priority of liens.

Further, in the dissenting opinion (page 24), is an additional quotation from Gardner v. New Jersey, 329 U. S., at page 577. We do not have the official volume, 329, but in Supreme Court Reporter advance sheet, February 1, 1947 (67 S. Ct., at page 473), immediately preceding the language quoted on page 24 (R., ...) of the dissenting opinion, is this:

"If the reorganization Court lacked the power to deal with tax liens of a State, the assertion by a State of a lien would pull out chunks of an estate from the reorganization Court and transfer a part of the struggle over the corpus into tax bureaus and other State tribunals. That would not only seriously impair the power of the Court to administer the estate and adversely affect the power of the Interstate Commerce Commission and the Court to promulgate a reorganization plan."

Then are cited Smith v. Hoboken R. R. &c. Co., supra, and Ecker v. Western Pacific R. Corp., 317 U. S. 448, 466-475, 63 S. Ct., 692, 704-708.

We have previously discussed Smith v. Hoboken R. R. &c. Company, and shown that in the situation there considered by the Court, the Commission had not yet formulated a plan. In the case at bar, it has. It has said to the debtor "acquire, if they can be acquired on the terms hereinafter set forth properties at present leased to the debtor by the South Western Railroad. * * * If any of these properties shall not be acquired * * * then, and in that event, the lease * * * of any line * * * not so acquired * * * shall be disaffirmed * * *" (R., pages 138-39).

(We find nothing in the Ecker case which militates against our position here.)

And almost immediately following the language quoted on page 4 of the dissenting opinion is this:

"We hold that the reorganization Court has jurisdiction over **all the property of the debtor** including that on which New Jersey asserts a lien and that the power of the Court to deal with liens extends to the lien which New Jersey claims" (64 S. Ct., at page 474). (Emphasis ours.)

Here was simply an application of "the res exception," though the lien claimant was a State. Here the Court was dealing with a case in which a State asserted a lien against "property of the debtor" in the possession of the reorganization Court. Those statements alone would suffice to demonstrate the inapplicability of the Gardner case here. But further in the opinion the Court used language which we think is favorable to our contentions here. At pages 476 and 477 of 67 Supreme Court Reporter, the Court said

> "This controversy is now in a different posture. New questions of local law emerge—whether Wilentz v. Hendrickson, supra, controls this case; whether a valid settlement can be made under an unconstitutional act and, if so, whether this alleged compromise was valid and effective; whether, if the settlement was not binding, the amount of the claim or the extent of the lien has been altered by the payments made during reorganization or by the conduct of the parties.
>
> "These points have been briefed and argued here. The difficulty is that neither the reorganization court nor the Circuit Court of Appeals passed on them. The reorganization court passed solely on a question of jurisdiction—whether it had the power to make adjudication concerning the amount of New Jersey's claim which should be allowed and the validity and extent of her lien, or whether New Jersey's sovereign immunity stood in the way of such determinations. And the Circuit Court of Appeals did not pass on these questions because it, too, was concerned solely with the question of jurisdiction.
>
> "(20) These issues bristle with questions of New Jersey law on which we should not pass, even if we were to assume that they are properly here, without the benefit of the views of judges who sit there and

have a greater familiarity with local law and local practices than we. See Huddleston v. Dwyer, 322 U. S. 232, 237, 64 S. Ct. 1015, 1018, 88 L. Ed. 1246; Brillhart v. Excess Insurance Co., 316 U. S. 491, 497, 62 S. Ct. 1173, 1176, 86 L. Ed. 1620; City of Hammond v. Schappi Bus Line, 275 U. S. 164, 169, 48 S. Ct. 66, 68, 72 L. Ed. 218; Wilson Cypress Co. v. Del Pozo Y Marcos, 236 U. S. 635, 657, 35 S. Ct. 446, 454, 59 L. Ed. 758. And for a review of the earlier cases, see dissenting opinion of Mr. Justice Brandeis in Railroad Commission of California v. Los Angeles R. Co., 280 U. S. 145, 164, 165, 50 S. Ct. 71, 76, 77, 74 L. Ed. 234. Moreover, we are now advised that there is presently pending before the Circuit Court of Appeals an appeal by the Attorney General of New Jersey from an order of the reorganization court denying leave to join the trustee as party defendant in a suit in the New Jersey Court to determine whether there was a valid settlement of the tax claims and to stay further determination of that controversy in the federal court until the state courts have passed on the question. If the Circuit Court of Appeals orders the application granted, cf. Thompson v. Magnolia Petroleum Co., 309 U. S. 478, 483, 60 S. Ct. 628, 630, 84 L. Ed. 876; Ex parte Baldwin, supra, 291 U. S., p. 619, 54 S. Ct. 555, 78 L. Ed. 1020, the state law phases of the controversy will be authoritatively settled. If the other course is followed, the issues can be resolved by the reorganization court on a record more adequate than the present one for purposes of review. Whatever procedure is followed it is more fitting that those more versed than we in the intricacies and niceties of New Jersey law first pass on these questions."

The Gardner case, supra, was decided by the Court January 20, 1947.

Subsequently, the Circuit Court of Appeals decided In re. Central R. of New Jersey, 163 Fed. (2d) 44 (July 15, 1947), the seventh headnote of which is as follows:

> "Where Circuit Court of Appeals and bankruptcy court could only guess as to what decision of New Jersey Court of Chancery would be as to existence of contract between debtor railroad and state of New Jersey regarding payment of taxes notwithstanding unconstitutionality of New Jersey acts which provided for settlement of railroad taxes, and only by reference to state court could problem be solved, and controversy was peculiarly justiciable in state court, denying state's request to have contract question determined in state court was error. P. L. N. J. 1941, page 768, as amended by P. L. 1942, page 651; Bankr. Act, Section 27, 11 U. S. C. A., Section 50."

This Court was asked to grant the writ of certiorari to review the questions decided there. The petition was denied on October 27, 1947 (68 S. Ct. 112-13).

Finally, on this phase, this Court said in Mandeville et al. v. Canterbury, 318 U. S. 47, 48-49, 63 Sup. Ct. Rep. 472, 473:

> "Section 265 of the Judicial Code, 28 U. S. C. A., Section 379, 28 U. S. C. A., Section 379, provides that except as authorized by any law relating to proceedings in bankruptcy 'the writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a State.' To this sweeping command there is a long recognized exception that if two suits pending, one in a state and the other in a federal court, are in rem or quasi in rem, so that the court or its officer must have possession or control of the property which is the subject matter of the suits in order to proceed with the cause and to grant

the relief sought, the court first acquiring jurisdiction or assuming control of such property is entitled to maintain and exercise its jurisdiction to the exclusion of the other.

"In such cases this Court has uniformly held that a federal court may protect its jurisdiction thus acquired by restraining the parties from prosecuting a like suit in a state court notwithstanding the prohibition of Section 265. This exception to the prohibition has been regarded as one of necessity to prevent unseemly conflicts between the federal and state courts and to prevent the impasse which would arise if the federal court were unable to maintain its possession and control of the property, which are indispensable to the exercise of the jurisdiction it has assumed. (But where the judgment sought is strictly in personam for the recovery of money **or for an injunction compelling or restraining action by the defendant**, both a state court and a federal court having concurrent jurisdiction may proceed with the litigation at least until judgment is obtained in one court, which may be set up as res judicata in the other. These principles were recognized and the authorities sustaining them collected in Penn General Casualty Co. v. Pennsylvania, 294 U. S. 189, 55 S. Ct. 386, 79 L. Ed. 850, and Toucey v. New York Life Ins. Co., 314 U. S. 118, 134-36, 62 S. Ct. 139, 144, 145, 86 L. Ed. 100, 137 A. L. R. 967)." (Emphasis ours.)

Was the injunction sought and granted by the Federal Court authorized by any law relating to proceedings in bankruptcy?

The exclusive jurisdiction of the Bankruptcy Court in reorganization proceedings is that which Bankruptcy Courts have customarily possessed.

Meyer v. Fleming, 327 U. S., 66 Sup. Ct. 382.

After citing that case, the majority opinion of the Circuit Court of Appeals states (Opinion, page 4):

> "In entering the judgment in this case, annulling and staying proceedings in the State Court, the Bankruptcy Court undertook in a summary proceeding to exercise exclusive jurisdiction in rem as to property that the Trustee did not own, but was seeking to acquire. The proceeding in the State Court that was enjoined, and the injunction that was annulled, were strictly in personam. It does not appear from this record that the Bankruptcy Court had any jurisdiction whatever of that controversy; but, conceding that it did, such jurisdiction was concurrent, not exclusive, and should not have been exercised in a summary proceeding."

The jurisdiction which Bankruptcy Courts have customarily possessed is thus stated in Title 28, U. S. C. A., Section 379, Note 28, page 232:

> "By this Section (255 of the Judicial Code) and Section 29 of Title 11, Bankruptcy, the Bankruptcy Court is especially authorized to issue injunctions against the parties and stay proceedings in the State Courts **when necessary for the exercise of its jurisdiction.**" (Emphasis ours.)

It was not necessary for the District Court to have enjoined the action in the State Court in order that it might exercise its jurisdiction. It had none. It has none.

What was the situation on March 25, 1947, when Benton instituted his action in the State Court against South Western Rail Road Company, its officers and directors—not against the Trustee.

The Interstate Commerce Commission had approved a plan of reorganization for the Central of Georgia Railway

Company which simply authorized that debtor to make an offer for the properties of South Western. The exact language in that respect is shown in the record (pages 138, 139). The plan was approved by the District Court Judge in an opinion and order dated June 24, 1946. The plan had not provided that the properties might be acquired by a simple majority vote of the stockholders of the Company. Neither did the opinion and order of the District Court of June 24, 1946. He simply said: "If the lessors do not accept the proposal to acquire their lines, they are, on disaffirmance, at liberty to take their properties back" (R., page 112). He did not attempt to adjudicate the method of acceptance, the nature of the corporate action necessary to constitute an acceptance. There were no proceedings pending before him in which such questions could have been decided. Whether the properties of the South Western could be acquired by the debtor or the reorganized Company on the terms set forth in the plan was left by the Commission and by the Bankruptcy Court in its order of June 24, 1946, to the stockholders of the Company to decide. Whether such acceptance on the part of the Company could be based on a vote of the majority of the outstanding stock of the Company was a question as to which Benton and other stockholders, on the one hand, and the officers and certain of the directors, on the other hand, differed. That difference was placed before the Superior Court of Bibb County, by respondent, Benton, by his action of March 25, 1947, for decision at a time when the District Court had no proceedings before it in which that question could have been determined, even if the Bankruptcy Court would have had any jurisdiction to decide it on the petition of anyone. The Trustee was not a party to the State Court proceeding so instituted. Neither was the Central of Georgia Railway Company. The proceeding in the State Court would not have had the effect of defeating or im-

pairing the jurisdiction of the District Court in the reorganization proceedings.

On the contrary, the proceedings in the State Court would give to the Commission an authoritative answer, under the laws of Georgia, to the question whether or not the lessor, South Western, had legally accepted "the proposal to acquire its lines."

The answer to that question was being determined in an orderly manner in a proper forum, in proceedings between South Western and its stockholders, when the Trustee, not a party to the case, filed the injunction proceedings in the State Court.

This status seems to us to have been misconceived in the minority opinion, wherein (Opinion, page 16) it is said:

> "The opinion of the majority in stating the case as though the State Court jurisdiction had first attached, the State Court injunction had been first issued, that is as though it were the United States Judge, and not the State Judge, who had been guilty of a gross breach of comity (a) here, and in failing to state that the State Court injunction was issued to stay action in the Reorganization proceeding after and in defiance of the issuance of the Federal Court injunction, puts the Federal District Judge in the invidious position in which the facts place the State Court judge" [(a) citing, among others, Bryan v. Speakman, 53 Fed. (2d), at 465].

This statement seems to assume that upon the filing of the petition for reorganization by the Central of Georgia in 1940, and the later promulgation of the plan, the Bankruptcy Court was vested with exclusive jurisdiction over the internal affairs of South Western Rail Road Company, a solvent Georgia corporation, simply because it had

leased its properties to the bankrupt corporation. For, in the absence of such assumption, the State Court jurisdiction "had first attached" as to the subject matter of the suit therein instituted. The very case of Bryan v. Speakman, supra, so demonstrates. We assume that in the reference to page 465 of this opinion the allusion is to the following language:

> "By the great weight of authority, it has always been the law that the rule which operates to prevent unseemly conflicts between State and Federal Equity Courts, that that which first acquires jurisdiction of a res retains possession of it . . . has governed the relation between State Courts and Courts of Bankruptcy. . . ."

That case involved a contest between a State Court Receiver and a Bankruptcy Trustee. The chronology is shown at page 464:

July 29, 1930: Mortgage Trustee presented to Superior Court Judge bill for foreclosure, appointment of receiver, and injunction.

July 29, 1930: Petition read, sanctioned, and ordered filed. Process issued. Hearing on receivership application was by the Court postponed to September 15, with right of acceleration upon twenty-four hours notice.

July 30, 1930: Bill served.

September 5, 1930: Appellee appointed Receiver by U. S. District Court of Delaware.

September 10, 1930: Appellee appointed Ancillary Receiver by U. S. District Court (Ga.).

September 15, 1930: Appellant appointed Receiver by State Court, and on

October 3, 1930: Filed petition in U. S. Court for turning over of property to him, which was denied.

In reversing, Judge Hutcheson, speaking for the Circuit Court of Appeals, said [53 Fed. (2d) at page 466]:

> "In Reisner v. G. C. & S. P. Ry. Co., 89 Texas 656 . . . in a thoroughly and well reasoned opinion reversing the then state of the law, the Supreme Court of Texas held: 'Whenever the Judge of a Court has acted upon the application in such way as to indicate that he has determined that he will investigate the matter, and may appoint a Receiver at some future date, the property is thereafter considered in the custody of the law, and not liable to the process of any other Court pending such investigation. . . . May v. Printup, 59 Ga. 128.' . . ."

Here, the State Court Judge acted upon the petition for injunction on March 25, 1947, by sanctioning it and issuing a rule nisi thereon, returnable March 26. This would, in itself, have been sufficient to indicate that he would investigate the matter, and that he might grant the interlocutory injunction. But a further step was taken in the State Court. The South Western Rail Road Company and certain of the individual defendants responded to the rule nisi, and a hearing was held on March 26 and 27, 1947, at the conclusion of which the State Court Judge reserved his decision as to whether or not he would grant the injunction. This was the status of the State Court suit when, on April 18, 1947, upon the petition of the Trustee, a stranger to the State Court suit, the Federal Judge (of the Bankruptcy Court) issued an order restraining Benton from prosecuting his State Court suit. It was in this status that, on April 24, 1937, the Judge of the State Court, of his own motion, issued an interlocutory injunction against the defendants in the State Court suit (R., pages 246-249).

In one of the opening sentences thereof the dissenting opinion seems to overlook the fact that, with respect to

the question of the validity of an acceptance of the offer with respect to the question of whether the properties of South Western could legally be conveyed to and acquired by the debtor by a mere majority vote of the stockholders of South Western, the State Court first acted under the circumstances stated in the preceding paragraph. The dissenting opinion states (page 15 thereof):

> "In determining this ultimate question, three primary questions must be answered. The first one is: 'After the minority stockholders have been enjoined by the Reorganization Court from proceeding with their injunction suit, can a State Court Judge, of his own motion, issue the injunction as prayed, staying the whole reorganization proceedings as to the leased railroad until the controversy between the minority stockholders and the Company over the necessity for unanimous stockholders' consent has been determined by the State Court?' "

This question overlooks the salient fact that **before** the minority stockholders had been enjoined by the Reorganizing Court from proceeding with their injunction suit, the State Court Judge had not only formally taken jurisdiction thereof, but had conducted a hearing thereon. The State Court Judge is in just as strong a position here as was the Federal Court Judge in Farmers Loan and Trust Company v. Lake Street Elevated Railroad Co., 177 U. S. 51.

We respectfully suggest that the same oversight appears in the italicized statement at the beginning of the dissenting opinion.

In concluding this phase of the brief, we again state that the respondents have never asked the State Court to set aside the plan of the Commission. Nor have they asked

that the order of the Bankruptcy Court below, approving it, be reversed. Full effect has been given to the language of the plan. We simply say that the debtor cannot acquire the properties of South Western on the terms, for the price, set out in the plan by an acceptance of the offer of the Trustee, when that acceptance is authorized by a mere majority vote of the stockholders.

And, in support of our position as just stated, we cite Central New England Ry. Co. v. Boston and Albany R. Co., 279 U. S. 415, and more especially the language of the Court at page 421:

> "Here, respondent does not ask that the order be set aside or that it be regarded as illegal and void; it insists only that the order did not purport to deal with the contract between the carriers, and so cannot have the effect, attributed to it by petitioner, of annulling the contract. The question is merely one of the legal effect of the order. Neither party contests its validity or asks that the carrier be compelled to do anything inconsistent with its terms."

CASES CITED IN BRIEF IN SUPPORT OF THE PETITION.

A great many of the cases cited in the brief in support of the petition have been treated by us previously in this brief, and no further reference need be made to them.

There are others which should be considered.

At pages 13-14 of the brief in support of the petition, it is stated:

> **"The Commission has full power to authorize a purchase, merger, or consolidation on the vote of a ma-**

jority of the stock unless a different vote is required under applicable State laws, in which case the number so required shall assent.

"Section 5 (11) of the Interstate Commerce Act makes this provision in terms.

"The statute law of Georgia is contained in Code Sections 94-328, 94-329, 94-311 and 94-318 (copied in Appendix No. 2). Under these Statutes all that is required is the vote of a majority of the stock. Code Sections 94-311 and 94-318 do not specify the vote necessary but it has been decided that a majority vote is sufficient.

Dady v. Georgia & Alabama R. Co., 112 Fed. 838.

"Code Sections 94-311 and 94-318 are part of the General Railroad Laws of Georgia under which the Debtor is incorporated. Power given under these latter Code sections confers power on both corporations to consolidate or sell.

Theis v. Spokane Falls Gas Light Co., 49 Wash. 477, 95 Pac. 1079, 1080.

"There is no other applicable State Law on the subject in Georgia.

"We think Section 5 (11) is referring to Statute Law, and if there is no different Statutory law in the State, the majority rule of the Federal Statute must prevail.

"The Commission would not be bound to follow a decision of the Georgia Court, that unanimous stockholder consent is necessary, because this would nullify altogether the power of the Commission in the premises. Morever, this would be wholly inconsistent with the other provisions of Section 5 (11)."

There are at least three answers to this contention:

1. The Commission in the plan did not authorize a purchase, merger, or consolidation on the vote of the majority of the stock or on any other vote. The plan simply authorized the debtor to acquire the properties of the South Western on the terms therein stated.

2. While Code Sections 94-311 and 94-318 are part of the General Railroad Laws of Georgia, under which the **debtor** was incorporated, they are **not** a part of the law under which South Western was incorporated, and therefore do not apply to it. These sections were codified from the General Railroad Incorporation Act, enacted by the General Assembly of Georgia in 1892. South Western was incorporated by a special Act of the General Assembly enacted in 1845, and has never become amenable to the General Railroad Incorporation Act.

3. This very distinction was recognized in Dady v. Georgia & Alabama R. Co., 112 Fed. 838, at page 842-843 of Judge Speer's opinion, from which we quote:

> "There are several grounds upon which complainants insist that they are entitled to relief. **The first is that it requires the unanimous consent of the stockholders of the Georgia & Alabama Railway before the complainants can be permitted to consolidate or merge that company with the Seaboard Air of the Florida Central & Peninsular.** In support of this proposition they cite the case of Alexander v. Railroad Co., decided by the Supreme Court of the State of Georgia, and reported in 33 S. E. 866. There the defendant company was enjoined from building a belt line railroad, when it had no authority in its charter to do so. **The Court held in that case that 'proper corporate action' was nothing less than the unanimous consent**

of every stockholder. There, however, the defendant company was not chartered under the general railroad law of the state; and the Court in that case held that, if the road had been under that general law, the company could indefinitely extend its railroad, build branch roads from any points on its line, consolidate with any other railroad company, or lease the property thereof, if not a competing line, build and operate steamboats, etc. 'Certainly,' the Court continues, 'the original incorporators of the West Point Company would never have recognized as their own the simple charter they obtained, after such additions as these, and numerous others that might be mentioned, had been added to it.' **In other words, the supreme court of the state seems carefully to distinguish a case like that before them and a case like that before the court;** for here the Georgia & Alabama Railway is chartered under this general law, and the court adds that the provisions of the general railroad law constitutes the whole or a portion of the railroad charter." (Emphasis ours.)

Dady et al, v. Georgia & Alabama Railway Company et al., 112 Fed., pages 842-43.

In the case **now** before the Court, the Court is not dealing with a corporation chartered under the general law as was the Georgia & Alabama Railway in the Dady case, but **is** dealing with a railroad company not chartered under the general railroad law of the State, as was the Atlanta and West Point in the Alexander case.

Instead of being authority against us, the Dady case is authority for the position we are taking.

At page 18 of the brief in support of the petition, it is stated: "The Commission has decided that it is in the

public interest that the reorganized Company should acquire the railroad properties of South Western, because it is an integral and important part of the system of the Central."

We respectfully differ with this statement, and assert that the Commission decided no such thing. Again we repeat, in part, what the Commission did say:

> "Prior to or upon consummation of the plan, the debtor shall also acquire, **if they can be acquired on the terms** hereinafter set forth, properties at present leased to the debtor by the South Western Rail Road . . . . **If any of these properties should not be acquired** . . . . then and in that event the lease or leases of any line . . . . not so acquired, shall be disaffirmed . . . ." (R., pages 138-139). (Emphasis ours.)

The plan simply authorized or directed the debtor to acquire the South Western if it could, and, if it could not, made provision for a disaffirmance of the lease.

With respect to this the majority opinion (page 6) of the Circuit Court of Appeals pointed out:

> "In the instant case, the plan assumes that the fee of the leased lines will be acquired by the acceptance of the plan, and provides that, if not accepted, the lease of any such line shall be disaffirmed. Not only that, but the Act itself looks forward to the contingency of a lease being rejected and of the lessor being unable to operate the line. In this event, the Act provides that it shall be the duty of the lessee to continue to operate the line for account of the lessor until the abandonment of such line be authorized by the Commission [11 U. S. C. A. 305 (c) 6]. There is no danger of the public interest being adversely

affected by rejection of the lease and the inability of the lessor to operate the railroad."

At page 21 of the brief in support of the petition, it is stated:

> "XIV. In the exigencies which confront South Western, it clearly has power under Georgia law to sell its railroad property on the vote of a majority of its stock."

As we read the majority opinion of the Circuit Court of Appeals, it did not pass on this question. The dissenting opinion (page 16) states as what it considered the third question to be: "Was the District Judge right in deciding that unanimous consent of South Western's stockholders was not necessary, that majority consent was sufficient?" The only answer the dissenting opinion makes to that question is in the last few lines thereof, where, without any citation of authority whatsoever, the dissenting Judge stated that the determination of the Federal Court favorable to the acceptance of the plan was right (Opinion, page 25). There was no citation of authority, although the **State Court Judge** had determined this question of State law to the contrary.

We cannot conceive how this question can possibly be before this Court at this stage of the case. Nevertheless, we summarize briefly what we have said about it in the Courts below:

1. The charter of the South Western Rail Road Company, granted by the General Assembly of Georgia, is a contract between the State and the Company, and between the State and the stockholders of the Company.

2. The obligations of that contract cannot be impaired by subsequent legislation (Dartmouth College case, 4 Wheat. 518, 4 L. Ed. 629).

3. Laws which subsist at the time and place of making a contract, enter into and form a part of it as if they were expressly incorporated in the contract. The obligation of a contract is measured by the standard of the laws in force at the time it was entered into. Its performance is to be regulated by the terms and rules which they prescribe (12 American Jurisprudence, page 14, Constitutional Law, Section 386, citing many Supreme Court cases, among others: W. B. Worthen Co. v. Kavanaugh, 295 U. S. 56, 55 Sup. Ct. 55, holding:

> "To know the obligation of a contract, we look to the laws in force at its making" [295 U. S., at page 60].)

4. As the law of Georgia stood in 1845:

> "A railroad corporation cannot, without special authority of statute, alienate its franchise or property acquired under the right of eminent domain, or essential to the performance of its duty to the public, whether by sale, mortgage, or lease."
>
> Singleton v. South Western Railroad, 70 Ga. 464.

5. The Act of 1933 (Code of 1933, Sections 94-328, 94-329, App. to petition, page 6) permitted the South Western **only so far as the State of Georgia was concerned** to alienate its properties. It did not affect the contractual rights of the stockholders under the charter.

> Mayor etc. of Knoxville v. Knoxville & O. R. Co., 22 Fed. 758 (appeal dismissed 136 U. S. 642);
> Alexander v. A. & W. P. R. Co., 108 Ga. 151.

6. The latter case is decisive of the question of State law controlling here, was so held to be by the State Court Judge and it and his decision are binding on the Federal Courts.

> Erie R. Co. v. Tompkins, 304 U. S. 64, 58 Sup. Ct. 817;

Ruhlin et al. v. New York Life Ins. Co., 304 U. S. 202, 58 Sup. Ct. 860;

Fidelity Union Trust Co. et al. v. Field, 311 U. S. 169, 61 Sup. Ct. 176,

holding:

> An intermediate State Court, in declaring and applying the State law, is acting as an organ of the State, and its determination, in absence of more convincing evidence of what State law is, should be followed by a Federal Court in deciding a State question;

Huron Holding Corporation et al. v. Lincoln Mine Operating Company, 312 U. S. 183, 61 Sup. Ct. 513, holding:

> In determining what is the law of a State, Federal Court may look to decisions of lower State Court as well as those of highest Court of State.

7. An analysis of Alexander v. A. & W. P. R. Co., 108 Ga. 151:

(a) The charter of the Atlanta and West Point R. R. Co. consisted of special Acts of the General Assembly of Georgia, enacted prior to the passage of the General Railroad Incorporation Law;

(b) Under its charter, the A. & W. P. had no authority to build a belt railroad from any point on its road to any other railroad;

(c) The General Railroad Incorporation Law was enacted, which provided that any railroad company theretofore created might, when "authorized by proper corporate action", amend its charter so as to acquire the corporate powers embraced in the general law, which included the right to build the branch railroad in question;

(d) The A. & W. P. sought so to amend its charter. This action was authorized only by a majority of the stockholders and not by unanimous consent;

(e) A number of the minority stockholders of A. & W. P. filed an equitable petition to enjoin the building of this belt or branch line as authorized by the amendment to the charter;

(f) The application for the amendment was a "mere nullity" (h. n. 3), having been based on the resolution of a mere majority of the stockholders which was not "proper corporate action" (h. n. 2);

(g) The building of the line was enjoined.

8. The controlling parallel of the Alexander case to the case as decided by the State Court Judge is:

(a) The charter of South Western consisted of special Act of the General Assembly of Georgia enacted prior to the passage of the General Railroad Incorporation Law;

(b) Under this charter, the South Western had no authority to sell its railroad properties (Singleton v. South Western, 70 Ga. 464 [2]);

(c) An Act of the General Assembly of Georgia was enacted in 1933 (Code of 1933, Sections 94-328, 329) which authorized a railroad corporation under certain conditions to sell or lease its property, rights, and franchises upon such terms as may be agreed upon by the Board of Directors and assented to by the holders of a majority of the stock;

(d) South Western seeks to avail itself of this Act, and sell its properties by virtue of a resolution adopted by a mere majority of its stockholders;

(e) Minority stockholders seek to enjoin such sale;

(f) The Act of 1933, not having been accepted by the stockholders as an amendment to the charter of South Western by "proper corporate action," the resolution authorizing the sale is a mere nullity;

(g) The sale of the properties was properly enjoined.

CONCLUSION.

In the absence of a statement of "questions presented" in the petition for certiorari, and the very general nature of the petition for certiorari and the brief in support thereof, our brief in opposition is, perforce, rather general.

We most respectfully submit that either on the basis that this case does not come within any class of cases in which petitions for certiorari are granted or on the basis of the law involved, or on the basis of the failure of the petition to comply with Rule 38 (2), the petition should be denied.

An authorized rule of Court has the force of law.

Weil v. Neary, 278 U. S. 160, 49 Sup. Ct. Rep. 144 (cases cited 278 U. S., at page 169).

"The Court announces its determination to insist upon a strict observance of all rules intended to facilitate the examination of causes, especially those submitted."

School District v. Insurance Co., 101 U. S. 472.

Respectfully submitted,

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